SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 354

JOSEPH J. IMHOFF, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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July 12, 1967

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No.

JOSEPH J. IMHOFF, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on October 14, 1966.

OPINION BELOW

The Opinion of the United States Court of Claims is unreported at this date, but will appear in 177 C. Cls. . It is reprinted herein as Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1). The Opinion of the Court of Claims dismissing the petition filed by petitioner was decided on October 14, 1966. A motion for reconsideration was denied on April 14, 1967.

QUESTIONS PRESENTED

The Department of the Army denied petitioner's application for disability retirement. In the processing of a retirement application, the Secretary of the Army has promulgated regulations which guarantee petitioner fair consideration of his application before several boards. This processing by the Secretary of the Army, acting through designated subordinates, was procedurally defective, thus presenting these questions:

(1) Is it repugnant to the guarantees of procedural due process for the decision of the Army Physical Disability Appeal Board to be issued by the office of The Adjutant General two days prior to the actual meeting of the Board itself to consider petitioner's appeal?

(2) Whether the Secretary of the Army, acting through his designated subordinate, the Physical Review Council, must comply, and if so, whether he has complied with his own[1] directives which guarantee to petitioner the right to submit a rebuttal on the point of disagreement between the Council and the Physical Evaluation Board?

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[1] The Department of Defense pamphlet in question is a joint directive issued simultaneously by the Secretaries of the Army, the Navy, the Air Force, and the Treasury, and is applicable to the retirement of all Armed Forces personnel.

(3) Whether such directives issued by the Secretary of the Army have the force and effect of law?

(4) Is the opinion by the Court below, on the important question of the applicable standard as to what constitutes physical disability under the law to be applied in determining such disability, in conflict with the established decisions involving this same question?

REGULATIONS INVOLVED

This case involves:

(1) Department of Defense publication—DA Pamphlet 21-48/AF PAM 34-4-1, effective 14 January 1952, issued By Order of the Secretaries of the Army and the Air Force (and reissued 14 August 1953 by Order of the Secretaries of the Army, the Navy, the Air Force and the Treasury), and printed in pertinent parts in Appendix B attached hereto.

(2) Army Regulation 15-160 (20 August 1953) establishing procedures for processing disability claims under Title IV, § 411, Career Compensation Act of 1949 (63 Stat. 823; 37 U.S.C. 281), and printed in pertinent parts in Appendix C attached hereto.

STATEMENT OF THE CASE

Petitioner was first commissioned in 1926; entered on extended active duty as a Captain, Field Artillery Reserve in 1941; promoted to Lieutenant Colonel, Regular Army, in 1949; and to Colonel on December 1, 1956.

In 1949, while serving on active duty in the Philippines, petitioner fell and injured his spine. During 1950 and 1951, he experienced severe low back pain and was placed under the care of an orthopedic surgeon.

In July 1953, he was ordered to enter Brooke Army Hospital, Fort Sam Houston, Texas. His attending physician at this hospital submitted a report of medical examination which showed petitioner not qualified for military service.

On July 27, 1953, a Medical Board, consisting of three medical officers, convened at Brooke Army Hospital, diagnosed petitioner's disabling condition as (1) degenerative joint disease and (2) lumbosacral strain and found petitioner permanently unfit for military service.

On June 30, 1953, petitioner appeared before a Physical Evaluation Board convened at Brooke Army Hospital which found petitioner physically unfit to perform the duties of his office, rank or grade by reason of physical disability incurred during his military service.

Petitioner's case was reviewed by an Army Physical Review Council in Washington, which in August 1953, through the Office of the Adjutant General, reversed the disability determination by the Physical Evaluation Board without advising petitioner of its "point of disagreement" with the Evaluation Board—as required by published directives.

Petitioner took issue with the Council's omission of specifics on the "point of disagreement" with the Physical Evaluation Board and the resulting denial of an opportunity for any presentation of competent medical evidence to rebut the Council's decision.

The record was then referred to the Army Physical Disability Appeal Board, which on August 31, 1953, concurred in the action of the Council that petitioner was physically fit.

Following petitioner's protests concerning procedural omissions in his physical disability review process, the Inspector General, Fourth Army, at the direction of the Fourth Army Commanding General, conducted an investigation and by report of October 30, 1953, concluded that petitioner had not been advised of the reasons for or "the specific items of disagreement" which formed the basis for the action of the Physical Review Council and that this asserted lack of specific information precluded petitioner from directing his rebuttal to any specific point, while finding that all procedures prior to the Council action were proper.

The Fourth Army Report of Investigation was forwarded to The Inspector General of the Army, Washington, in November 1953, for further investigation and report. That officer passed the report to the Physical Review Council, whose previous actions in the controversy were questioned, and who in turn prepared the reply used by the Adjutant General in answering the Fourth Army Commander. The Inspector General made no investigation. The letter to Fourth Army from the Adjutant General's office on January 29, 1954,[2] concurred in the action by the Council and the Physical Disability Appeal Board rejecting petitioner's claim.

Early in 1954, as directed by the Department of the Army, petitioner was given another medical examination at Fort Sam Houston and again found physically incapacitated for active duty. Again he was ordered

[2] Exhibits filed below (Def. 20, 27, 49, 80) reveal that one specific officer in the Adjutant General's office, Lt. Colonel E. Rinaldi, was responsible for the processing of petitioner's case at several levels of review, which resulted in this officer, and others, actually reviewing decisions in which they had previously had a part in making.

into Brooke Army Hospital, and again a Medical Board convened at this Hospital, found him permanently unfit for military service, which finding was sustained by the Physical Evaluation Board which met on June 11, 1954, and concluded that petitioner was forty per cent disabled, an increase of ten per cent over the 1953 evaluation.

The Physical Review Council, however, on June 25, 1954, again disagreed with the Evaluation Board and, again, without a finding on the "point of disagreement" the Council concluded petitioner was physically fit. Again, petitioner objected to this procedure.

Petitioner's objection was forwarded to the Office of the Adjutant General, who directed it on to the Physical Disability Appeal Board on July 13, 1954. On the same date, and two days before the Board met on July 15, 1954, to consider the matter, the Adjutant General sent a telegram to the Commanding General at Brooke Army Hospital stating that the Army Physical Disability Appeal Board "CONCURS IN THE FINDINGS OF THE ARMY PHYS REVIEW COUNCIL THAT SUBJ OFFICER PHYS FIT FOR DY."

On July 19, 1954, a further medical examination at Fort Sam Houston found petitioner not qualified for active duty and recommended that he be separated for physical disability.

In November 1954, petitioner was transferred to Washington, and given a limited duty assignment. In July 1956, he was advised by the Adjutant General that he would be retired by operation of law on November 30, 1956.[3]

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[3] Officer Personnel Act of 1947, as amended, Section 514(d)(4), 10 U.S.C. § 3916, requiring the retirement of Regular Army permanent Lieutenant Colonels 30 days after the date of completion of 28 years service.

On November 14, 1956, the Secretary of the Army ordered petitioner to appear before a Medical Board at Walter Reed Army Medical Center and, if warranted, before a physical evaluation board. In proceedings before the Court below, petitioner took issue with the extent and fairness of the hearing process accorded him at Walter Reed.

On November 21, 1956, this Board concluded he was fit for general service. And on November 29, 1956, the Adjutant General so advised him. Petitioner remained on active duty subsequent to January 1, 1957.[4] He was released from active duty on January 31, 1957.

On February 9, 1957, petitioner sought a hearing before the Army Board for Correction of Military Records to change his discharge to one for physical disability. This application was denied without a hearing.

On August 14, 1957, he was rated twenty per cent disabled by the Veterans Administration by reason of arthritis of the cervical and lumbar spine.

In the petition filed in the Court of Claims, petitioner sought pay differential between the grades of Lieutenant Colonel and Colonel for a three year period, and a Federal Income tax adjustment for the disallowance by the Internal Revenue Service of disability tax credit.

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[4] To take advantage of the Servicemen's and Veterans' Survivor Benefits Act, ch. 837, 70 Stat. 857 (1956), codified in scattered sections of U.S.C.

REASONS FOR GRANTING THE WRIT

A. Judicial review to determine whether or not pay has allegedly been withheld from a member or former member of the military services, has long been sanctioned by the Court. *Reynolds* v. *United States,* 292 U.S. 443; *Dismuke* v. *United States,* 297 U.S. 167.

The Court of Claims has concluded that petitioner was not denied any procedural rights in the disability review process accorded him by the Army. That ruling is in conflict with the controlling decisions of this Court which have held that in the administrative review process the reviewing board is required to exercise its own judgment, following its receipt of all the evidence in the case, rather than tolerate any prejudgment. It conflicts with those decisions which hold that procedural directives validly prescribed by the Secretary of the Army have the force and effect of law and are binding upon the Secretary and the Army. It conflicts with previously reported decisions establishing the applicable standards for a determination of disability in military retirement cases.

B. The issues raised in this case present important questions on the administrative process governing the entire military retirement system for all members of the Armed Forces of the United States. Unless reversed, the decision of the Court of Claims in this case will furnish controlling abusive guidelines to be applied in the consideration of every military retirement application—without regard to the applicable statutes and regulations.

We now outline these reasons in detail.

I

The Prejudgment by the Army Physical Disability Review Board Prior to Its Actual Convening Constituted a Denial of Due Process

Following the adverse ruling of the Physical Review Council in 1954, petitioner sought review by the Army Physical Disability Appeal Board, as granted in AR 15-160 (Appendix C). The report of the Physical Evaluation Board was transmitted by the Adjutant General to the Appeal Board on July 13, 1954.[5] The Appeal Board's official report to the Adjutant General was made by the Board's Recorder on July 15, 1954, two days later. (Appendix D)

But two days before the Board convened and entered its official decision, the Adjutant General, (on July 13, 1954) telegraphed the Commanding General at Brooke Army Hospital in Texas as follows:

> "TAG 44204 FROM AGPOSR YOUR M111700Z PARA REVIEW OF RECORDS CASE LT COL JOSEPH J IMHOFF 051009 QMC REVEALS ARMY PHYS DISABILITY BD CONCURS IN THE FINDINGS OF THE ARMY PHYS REVIEW COUNCIL THAT SUBJ OFFICER PHYS FIT FOR DY"
>
> (Pls. Ex. 10 and 17, reproduced in Appendix E)

The report by the Adjutant General was a prejudgment[6] of the Board's decision before the Board even convened to consider any of the evidence referred to it for consideration. The findings of this Board in 1954, just as in the 1953 proceedings, were not disclosed to petitioner.

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[5] Reproduced in Appendix D.

[6] Prejudgment here is analogous to an adjudication of guilt in advance of trial—a denial of due process guaranteed under the Fifth Amendment to the Constitution.

When a board *fails to exercise its own discretion* in rendering a decision, its proceeding is improper. *Accardi* v. *Shaughnessy*, 347 U.S. 260.

The right to full and fair consideration by an impartial review board is one of the fundamental rights, it is part of the "law of the land." *Davidson* v. *New Orleans*, 96 U.S. 97, 101; *Railroad Commission* v. *Pacific Gas Co.*, 302 U.S. 388, 393; *Jordan* v. *Massachusetts*, 225 U.S. 167, 176.[7] The rights of the retiring officer in his retirement must be protected by the rudimentary requirements of fair play and in terms of administrative consideration, such right is guaranteed only by a "fair and open hearing." *Morgan* v. *United States*, 304 U.S. 1, 15. At the very least the nominal guarantees of due process, which include a fair hearing and fair consideration, are in order. *Weiman* v. *Updegraff*, 344 U.S. 183.

When the Secretary of the Army, acting through his Army Physical Disability Appeal Board and the Office of the Adjutant General, prejudged the case, the retirement process was abused by "failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress[8] has authorized." *Dismuke* v. *United States*, 297 U.S. 167, 172.

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[7] Petitioner's entitlement to a "full and fair" hearing is guaranteed under 10 U.S.C. § 1214. (See Note 8, *infra*.)

[8] 10 U.S.C. 1214 provides:

> "No member of the Armed Forces may be retired or separated for physical disability without a full and fair hearing if he demands it."

And 10 U.S.C. 1216 authorizes the Secretary of the Army to prescribe the regulations for the disability review process.

II

The Applicable Directives and Regulations Require Issuance by the Physical Review Council of Specific Findings Which the Council Failed and Refused to Do

The Court of Claims concluded that DA Pamphlet 21-48 (Appendix B) "does not purport to be a regulation as such" (Appendix A, p. 8a, footnote 7). In its answer to the petition filed in the Court of Claims, defendant admitted that the document was "promulgated for compliance by all of the Armed Forces and applicable here" (par. 8 of Answer).

The document itself (1953 Edition) (Appendix B, p. 39a) details that it is "published for the information and guidance of all concerned," "BY ORDER OF THE SECRETARIES OF THE ARMY, THE NAVY, THE AIR FORCE, AND THE TREASURY."[9]

The directive is issued as part of the retirement process and guaranteed to petitioner the following procedural rights which were denied:

(a) The right to have the Physical Review Council issue specific findings following its review (Appendix B, p. 38a).

(b) The right of petitioner to send in another statement "on the point of disagreement" if the Council did not agree with the Physical Evaluation Board (Appendix B, p. 37a).

AR 15-160 (Appendix C) also makes provision for findings by the Army Physical Review Council. No specific findings on this case were made, as the Fourth Army Inspector General later found. Petitioner was,

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[9] The 1952 Edition (Appendix B, p. 31a) was issued by Order of the Secretaries of the Army and Air Force.

therefore, absolutely unable to rebut the issue raised against him, because the only determination ever issued by the Council was that petitioner was considered "to be physically fit to perform the duties of [his] office and rank"—a conclusion equally applicable to any conceivable retirement case where the Council disagrees with the Physical Evaluation Board.

Of the two applicable alternatives (Appendix B, p. 37a), the Council could either "agree with the recommendations" of the Physical Evaluation Board or it could disagree, provided it notified petitioner of his "*right* to send in another statement on the point of disagreement" (emphasis added). It had no authority to act otherwise. When its erroneous and generalized conclusion was adopted by the several reviewing panels thereafter, this served only to compound the initial error.

The maintenance of proper standards in the retirement process, just as in any administrative proceeding, dictates that the petitioner be accorded a reasonable opportunity to know the medical contentions raised against him, as shown by the findings advanced by the Physical Review Council, in order to contest them. *Morgan* v. *United States,* 304 U.S. 1, 21-22.

For if the board or council has authority to make the order or determination and, if that authority depends upon determinations of fact, those determinations must be shown. *Panama Refining Co.* v. *Ryan,* 293 U.S. 388.

An administrative board must not shelter behind uncritical generalities. *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61; *United States* v. *Chicago M. St. P. & P.R. Co.,* 294 U.S. 499, 510, 511; *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515.

Findings must be definite, specific, and accurate. *Atchison T. & S F. R. Co.* v. *United States,* 295 U.S. 193, 201-202.

This Court has firmly established the principle that if a Government official or agency lawfully prescribes rules of procedure, these are binding on the Government as well as the petitioner. *Accardi* v. *Shaughnessy,* 347 U.S. 260, 267; *Bridges* v. *Wixon,* 326 U.S. 135, 153; *Chapman* v. *Sheridan-Wyoming Co.,* 338 U.S. 621; *Bilokumsky* v. *Tod,* 263 U.S. 149, 155. The rule applies even where the administrative action under review is discretionary in nature.

Similarly, military regulations have long been so recognized, *Ex parte Reed* 100 U.S. 13, 22; *Caha* v. *United States,* 152 U.S. 211, 221-22. Even the provisions of a War Department Technical Manual can furnish the guidelines for administrative due process in retirement cases. *Dickson* v. *United States,* 159 Ct. Cls. 185 (1962). A policy directive issued by the Secretary of the Air Force has been accorded the same force and effect as a regulation. *Roberts* v. *United States,* 151 Ct. Cls. 360, 365 (1961). The agency's interpretation of its own procedural rules is binding. *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 143. Procedural rules designed to govern the agency's own board proceedings are usually considered legislative rules, and legislative rules, such as the Armed Services Procurement Regulations, have been held to have "the force of law." *Paul* v. *United States,* 371 U.S. 245, 255.

The applicable directives here, having the force and effect of law, were issued to be followed. Their disregard furnishes ample reason for the grant of this petition.

III

The Opinion of the Court of Claims If in Direct Conflict With Its Opinion in Weiner v. United States

The Court of Claims' Opinion in *Weiner* v. *United States,* 148 Ct. Cls. 445 (1960), clearly sets the test for disability as physical incapacity for "performance of full military duty, field as well as garrison in both peace and war" (148 Ct. Cls. at 455).

Despite the unequivocal test established by the *Weiner* decision, the Court of Claims' opinion below (Appendix A, p. 6a), centers about petitioner's ability to perform his admitted limited service "desk job" and the duties assigned in connection therewith, rather than "full military duty." This is a major error.

Ten duly constituted Army Medical boards, before which petitioner personally appeared, were unanimous in finding petitioner physically unfit for duty under the standards for fitness set forth in the *Weiner* decision. This included a final type medical report at Walter Reed on January 31, 1956 (Appendix A, p. 19a), which also showed petitioner to be unfit. The eleventh, and only board before which he appeared (Medical Board at Walter Reed on November 21, 1956) which did not find petitioner physically unfit, denied him a "full and fair hearing" (10 U.S.C. 1214) when, among other irregularities, (1) the Board report of proceedings was prepared in advance of the hearing by its Recorder; (2) the Board president signed the Board report before the hearing had closed, and one Board member failed to sign the report; and (3) the Board president denied petitioner the right to complete the presentation of his case before the Board with the explanation that the Board had reached its decision prior to convening. This was another case of prejudgment. In this instance, petitioner was not examined

by any Medical Officer. This proceeding was prejudicial and denied petitioner the right of further consideration by a Physical Evaluation Board—which was the only course of action warranted by petitioner's medical record.

In every case where he was personally examined by a medical officer, petitioner was found unfit for military duty. The Court of Claims has applied a completely different standard in the case below in reviewing petitioner's record. It has measured petitioner's fitness by his ability to perform a "desk job" rather than by his fitness for general military duty. This is contrary to its decision in *Weiner,* prejudicial to petitioner, and denies him the consideration to which he is entitled by the established precedent. In so holding, the Court of Claims is in conflict with its own decision in the *Weiner* case.

If the decision of the Court of Claims is permitted to stand, it will become the final word on the standards to be applied in physical disability cases. The erroneous procedural review will become the accepted practice for the military boards to follow. Guarantees of due process and fair treatment will be discarded. An authoritative review of such procedures is required and must be settled in this case.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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July 12, 1967

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 475-58

(Decided October 14, 1966)

JOSEPH J. IMHOFF

v.

THE UNITED STATES

Warren E. Miller, attorney of record, for plaintiff.

LeRoy Southmayd, Jr., with whom was *Assistant Attorney General John W. Douglas*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, and COLLINS, *Judges*.

Opinion

COLLINS, *Judge*, delivered the opinion of the court:

In November 1956, plaintiff, a lieutenant colonel in the United States Army who had served for more than 28 years, was retired from active service by reason of length of service. The basis for the present suit is plaintiff's assertion that he should have been retired, as of September 1953, for physical disability.[1]

Detailed findings of fact are contained in the report of Commissioner Paul H. McMurray. His findings, subject to a number of modifications, have been adopted by the court

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[1] The precise nature of plaintiff's claims is explained in finding 2, *infra*.

and are set forth *infra*. The facts can be summarized as follows: Plaintiff was first commissioned in 1926, and, in 1941, he began extended active duty as a captain in the Field Artillery Reserve. In 1949, while serving in the Philippines, plaintiff fell on a flight of stairs and injured his spine. In 1950, plaintiff experienced severe low back pain while engaging in calisthenics at Fort Lee, Virginia. He was confined to his quarters for several weeks.

In July 1953, plaintiff was admitted to Brooke Army Hospital, Fort Sam Houston, Texas, because of continuing complaints regarding his back. He appeared before a Medical Board which made diagnoses of (1) degenerative joint disease and (2) lumbosacral strain and found plaintiff permanently unfit for military service. In accord with the recommendation of the Medical Board, plaintiff's case was considered by a Physical Evaluation Board. It was the opinion of the Physicial Evaluation Board that plaintiff was unfit for service and that the proper disability rating was 30 percent.

The proceedings were considered next by the Army Physical Review Council. On August 12, 1953, the Adjutant General wrote plaintiff of the Council's determination that "The evidence of record does not clinically confirm the existence of any disability of a degree which would preclude the performance of military duty." Plaintiff submitted objections to the findings of the Council. The entire record was referred to the Army Physical Disability Appeal Board which, on August 31, 1953, decided to concur in the finding that plaintiff was physically fit.

Plaintiff filed a protest in which he asserted that the failure of the Physical Review Council to specify the reasons for its reversal of the finding of disability meant that he was deprived of his right of rebuttal. By letter of September 29, 1953, plaintiff was informed that, after further consideration, the Physical Disability Appeal Board had reaffirmed its decision that he was physically qualified to

perform his duties. Plaintiff's belief that he was disabled continued and, in October 1953, he tendered his resignation to the Adjutant General.

Early in 1954, plaintiff was given another medical examination at Fort Sam Houston. Following the determination that he was physically incapacitated for active duty, plaintiff was again directed to appear before a Medical Board. Such a board was convened at Brooke Army Hospital, and it found that plaintiff was permanently unfit for military service. This finding was sustained by a Physical Evaluation Board which met on June 11, 1954, and concluded that plaintiff was 40 percent disabled. The diagnoses were neuralgia, degenerative joint disease, and strain of the lumbosacral ligaments. As in 1953, the recommendation of the Physical Evaluation Board was rejected by the Physical Review Council. In July 1954, the Council's finding that plaintiff was not disabled was affirmed by the Physical Disability Appeal Board.

On July 19, 1954, plaintiff requested that his resignation be held in abeyance, and the Adjutant General complied.

In November 1954, plaintiff was transferred from Fort Sam Houston to Washington, D.C. He was, at various times in the ensuing months, given out-patient treatment at Walter Reed Army Hospital. In July 1956, plaintiff was advised that he would be retired by operation of law on November 30, 1956.[2] Plaintiff was examined at the Pentagon dispensary and was found to be qualified for general service. In September 1956, he was admitted to Fort Belvoir Hospital for evaluation with respect to arthritis of the spine and a mass in the abdomen. During plaintiff's hospitalization, the lipoma was removed from his abdominal wall; the orthopedic department considered his arthritis not to be disabling.

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[2] See the Officer Personnel Act of 1947, as amended, 10 U.S.C. § 3916 (1964).

On November 14, 1956, plaintiff was ordered to report to Walter Reed Army Medical Center for observation, necessary treatment, and appearance before a Medical Board. Plaintiff was admitted to Walter Reed on the following day, and he underwent an extensive series of examinations. The Medical Board, which met on November 21st, concluded that plaintiff was fit for general service; the diagnoses of degenerative joint disease (osteoarthritis) and lumbosacral strain were termed "not incapacitating."

On November 29, 1956, the Adjutant General advised plaintiff that he was physically qualified for retirement and that his retirement would be effective on November 30th. However, in view of plaintiff's desire to remain on active duty subsequent to January 1, 1957, in order to take advantage of the Servicemen's and Veterans' Survivor Benefits Act, ch. 837, 70 Stat. 857 (1956) (codified in scattered sections of U.S.C.), he was recalled on December 1, 1956, and was released from active duty on January 31, 1957.

On February 9, 1957, plaintiff requested the Army Board for Correction of Military Records to change his discharge so as to provide for physical disability of at least 40 percent. The Correction Board denied plaintiff's application. Plaintiff also submitted a claim to the Veterans Administration which, in August 1957, advised him that his service-incurred osteoarthritis was considered to be 20 percent disabling.

Commissioner McMurray concluded that, in denying plaintiff disability retirement, the Department of the Army had not acted arbitrarily or without support of substantial evidence. To the extent the issues are factual, we are in agreement with the commissioner. Moreover, we are unable to accept the legal arguments made by plaintiff.

Plaintiff stresses the fact that, upon repeated occasions, he was found by an examining physician or a board of officers to be unfit for military duty. The number of such findings of disability does add strength to plaintiff's case,

but they cannot be decisive. As defendant points out, in both 1953 and 1954, the reviewing bodies refused to accept the respective Physical Evaluation Board's recommendation of disability retirement. *Cf. Nichols* v. *United States*, 158 Ct. Cl. 412, 415 (1962). Furthermore, in 1956, the Medical Board at Walter Reed determined that plaintiff was capable of performing general service.

The various agencies which made diagnoses were basically in accord as to the nature of plaintiff's infirmities. Thus, it appears that the disagreement related to the degree of severity of the ailments and to their effect upon plaintiff's ability to serve as an officer.[3] For example, Col. Walter A. Kostecki, one of plaintiff's expert witnesses, testified that: "[the] Walter Reed clinicians have agreed * * * with clinicians at Brooke Army Hospital that there is pathology here, the only difference * * * is in degree."[4]

The burden is upon plaintiff to show that the Department of the Army erred in denying his application for disability retirement. *Johnston* v. *United States*, 157 Ct. Cl. 474, 478 (1962). We cannot say that plaintiff has succeeded in meeting this burden. We find, to the contrary, that the decision of the Medical Board at Walter Reed and the action of the Correction Board were supported by substantial evidence. *Cf. Nichols* v. *United States, supra; McEaddy* v.

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[3] The 1953 Physical Evaluation Board acknowledged doubt as to whether plaintiff was disqualified. See finding 8, *infra*.

[4] Colonel Kostecki expressed the opinion that the doubt should be resolved in plaintiff's favor. Although plaintiff argues that the "doctrine of resolution of reasonable doubt" which the Veterans Administration applies was binding upon the Army, plaintiff fails to indicate a specific basis, in statute or regulation, for this assertion. With respect to use by the military of the Veterans Administration schedule, a distinction must be made between (1) the initial determination regarding disability and (2) rating disabilities which have been found. See, *e.g.*, 10 U.S.C. § 1201 (1964). In the present case, our concern is with the initial determination. *Cf., e.g., Patten* v. *United States*, 161 Ct. Cl. 131, 135 (1963).

United States, 152 Ct. Cl. 311 (1961). The record does not support plaintiff's allegations that the examinations which he received at Walter Reed just prior to his retirement were "rushed" and inadequate. Although plaintiff's medical processing was expedited from the administrative standpoint, the various tests and consultations which plaintiff had were sufficiently thorough. Also, the final Medical Board had the benefit of the record of plaintiff's earlier treatments at Walter Reed as well as the remainder of his file.

Defendant argues that the fact that plaintiff was able to serve efficiently until his retirement shows the propriety of rejecting, in 1953 and 1954, the findings of physical disability. Defendant notes that, for the period June 1, 1955, to May 31, 1956, plaintiff's performance was rated as "outstanding." Since plaintiff had a "desk job" and working conditions described as "ideal" during the period in question, the high efficiency rating should not be given undue emphasis in regard to the matter of fitness for general service. Nonetheless, we agree with defendant that plaintiff's ability to perform the duties assigned to him lends support to the actions of the Department of the Army. *Cf. Snell* v. *United States,* 168 Ct. Cl. 219, 226 (1964).

Plaintiff charges that the Medical Board at Walter Reed applied an erroneous standard of fitness. According to plaintiff, the proper criteria were "Office, Rank or Grade," and the board improperly considered such matters as age and experience.[5] Plaintiff construes the pertinent standards too narrowly. In *Johnston* v. *United States, supra,* 157 Ct. Cl. at 476, this court stated:

> * * * The regulations promulgated by the Secretary of the Army to effectuate this legislative authority

[5] In support of his assertion that age should not have been considered, plaintiff cites the Veterans Administration schedule for rating disabilities. See footnote 4, *supra.*

> [granted by the Career Compensation Act of 1949, as amended, 10 U.S.C. § 1216 (1964)], while enumerating certain medical standards, reasonably provide that each case will be considered on its individual merits, and that the overriding criterion will be general ability to perform the duties commensurate with the serviceman's age, grade, branch of service, and normal duties.
> • • •

We are satisfied, on the basis of the record in the present case that both the standards applied and the result reached were proper.

The inquiry is essentially a factual one. The medical history of the present plaintiff is quite different from those involved in *Woodard* v. *United States*, 167 Ct. Cl. 306 (1964); *Grubin* v. *United States*, 166 Ct. Cl. 272, 333 F. 2d 861 (1964); and *Wiener* v. *United States*, 148 Ct. Cl. 445 (1960), cases cited by plaintiff in which the respective claimants were found to be disabled.

Plaintiff contends that, during the years in which he sought to be retired for disability, he was the victim of numerous procedural irregularities. Great emphasis is placed upon the failure of the Physical Review Council in 1953 (and again in 1954) to state the precise reasons for overturning the finding of the Physical Evaluation Board that plaintiff was physically unfit. We must agree with defendant that plaintiff was adequately informed of the bases for the two decisions of the Physical Review Council. Each year, plaintiff was told in effect that the Council considered his infirmities to be of insufficient severity to warrant a finding of "disability." In both 1953 and 1954, plaintiff submitted lengthy statements in opposition to the determination of the Physical Review Council.[6] Plaintiff has not shown that he was actually harmed by the

[6] In 1954, plaintiff stated that his remarks were not intended as "rebuttal."

Council's failure to provide detailed reasoning or that any regulation required such specific information.[7]

Accordingly, this matter does not warrant a judgment in plaintiff's favor. The reasoning of *Service* v. *Dulles*, 354 U.S. 363 (1957), and that of *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), is inapplicable.

Another contention of plaintiff is that the Medical Board at Walter Reed did not grant him a "fair hearing."[8] Plaintiff's appearance before the board was extremely brief. However, this fact does not alter our conclusion that the decision of the board was based upon substantial evidence.

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[7] Plaintiff places great reliance upon Department of the Army Pamphlet 21-48 (the Jan. 14, 1952, and Aug. 14, 1953, editions) which provides *general* information about physical disability retirement. The pamphlet does not purport to be a regulation as such. It does state (p. 16 of the 1952 edition) that, if the Physical Review Council should disagree with the recommendation of a Physical Evaluation Board, the Council would notify the individual of his right to submit a rebuttal statement "on the point of disagreement."

Defendant does not question plaintiff's right of rebuttal. See Army Regulation 15-160 (Aug. 20, 1953). However, defendant does assert that plaintiff was not deprived of the right. As indicated above, we agree with defendant. Here, the point of disagreement was the very existence of "physical disability." (Other possible grounds for denying disability retirement would be lack of service connection or lack of permanence.)

[8] Plaintiff relies upon the statutory provision that "No member of the armed forces may be retired or separated for physical disability without a full and fair hearing if he demands it" (10 U.S.C. § 1214 (1964)) and upon DA Pamphlet 21-48 (see footnote 7, *supra*). Plaintiff has not demonstrated any specific rules which govern Medical Board proceedings. DA Pamphlet 21-48 contains some indication of the nature of Physical Evaluation Board hearings, but the same is not true of Medical Boards. Defendant correctly observes that, in view of the decision of the Medical Board at Walter Reed, plaintiff was not entitled to appear before a Physical Evaluation Board. *Cf. Wales* v. *United States*, 132 Ct. Cl. 765, 770, 130 F. Supp. 900 (1955).

We cannot accept plaintiff's allegations that the board treated him unfairly and arbitrarily.

In conclusion, the record shows widespread agreement that plaintiff was afflicted with osteoarthritis (of the cervical and lumbar spine) and with lumbosacral strain. Certain of the board, as well as plaintiff's expert witnesses, felt that plaintiff's conditions rendered him unfit for military service, while other bodies, including the 1956 Medical Board, considered plaintiff to be physically qualified. The record does not contain sufficient evidence of disability to justify a holding that the Department of the Army acted arbitrarily and erroneously. We cannot say that, in September 1953 or at any time prior to his retirement, plaintiff was physically incapacitated for general duty. It follows, therefore, that plaintiff is not entitled to recover.[9] The petition is dismissed.

Findings of Fact

The court, having considered the evidence, the report of Trial Commissioner Paul H. McMurray, and the briefs and argument of counsel, makes findings of fact as follows:

1. Plaintiff was mandatorily retired from active service in the Regular Army on November 30, 1956, not by reason of physical disability, under the provisions of section 514(d)(4), Officer Personnel Act of 1947, now codified in 10 U.S.C. § 3916 (1964). He was serving in the grade of Lieutenant Colonel at the time of his retirement, but was advanced to the grade of Colonel on the United States Army Retired List on December 1, 1956, with entitlement to the retired pay of a Colonel with over 30 years' longevity for basic pay purposes. Plaintiff was recalled to active duty in the grade of Colonel effective December 1, 1956, in view of his desire to remain on active duty subsequent to January

[9] As indicated in finding 2, each of plaintiff's claims rested upon the premise that he was disabled as of September 1, 1953.

1, 1957, in order to take advantage of the benefits of a then recently enacted Servicemen's and Veterans' Survivor Benefits Act, ch. 837, 70 Stat. 857 (1956) (codified in scattered sections of U.S.C.). Plaintiff was relieved from active duty effective January 31, 1957, reverting to his retired status, and has been receiving the retirement pay of a Colonel with 30 years' service since that date.

2. In this suit, plaintiff asks for judgment as follows:

(1) For the different between the pay he received as a Lieutenant Colonel on active duty and the pay he should have received as a Colonel, United States Army —Retired, recalled to active duty and serving in that capacity for the period 1 September 1953 through 30 November 1956, plus 6% interest thereon.

(2) For a refund of overpayments in Federal income taxes since 1 September 1953 by virtue of not having been granted disability retirement benefits, together with interest thereon at 6%.

3. Plaintiff, having been first commissioned in the Officers' Reserve Corps in 1926, entered on extended active duty in 1941 as a Captain, Field Artillery Reserve. He was successively promoted in the Army of the United States, attaining the rank of Colonel on October 23, 1945. His appointment as Colonel, Army of the United States, terminated on April 30, 1946, and plaintiff was appointed a Lieutenant Colonel, Army of the United States, on May 1, 1946. In 1947, plaintiff was appointed a Major in the Regular Army, Quartermaster Corps, and in 1949 promoted to Lieutenant Colonel, Regular Army.

4. In 1949, while serving in the Philippines, plaintiff fell on a flight of stairs and injured his spine.

During the period from November 13, 1950, to January 30, 1951, plaintiff was under the care of an orthopedic surgeon as the result of an acute episode of low back

pain, which occurred on October 23, 1950, while plaintiff was taking physical exercise at an Army post. Examination at that time revealed acute muscle spasm in the lower back associated with mild sciatic scoliosis and limitation of the lower spine. Neurological examination was normal. The diagnosis at that time was an unstable low back with structural defects in an acute episode. Plaintiff was put on bed rest and conservative treatment on which he improved. He wore a lumbosacral support and was advised against overexercising as far as his back was concerned.

5. On January 15, 1952, and again on November 12, 1952, plaintiff was examined and found physically capable of performing duties commensurate with his rank and experience, and on both examinations was assigned a Physical Profile of P U L H E S. These examinations were not
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"final type" detailed medical examinations.

6. Plaintiff's Efficiency Report, covering the period from June 1, 1952, to January 31, 1953, discloses therein that plaintiff's Executive Officer considered plaintiff to be active and apparently in good health, although somewhat overweight. For the period from February 1, 1953, to May 31, 1953, plaintiff's Chief of Section made the following comments on plaintiff's Efficiency Report:

> Loyal, thoroughly dependable, hardworking officer. He possesses unusual analytical ability. Has a cheerful disposition and a pleasing personality. Serious minded, great mental capacity. No mental, physical or moral defects.

7. On July 21, 1953, the Post Surgeon at Fort Sam Houston, Texas, recommended that plaintiff be hospitalized in view of continuing complaints of back pain. Plaintiff was admitted to Brooke Army Hospital, where a Medical Board, on July 27, 1953, made diagnoses of (1) degenerative joint

disease, (2) lumbosacral strain, and found plaintiff permanently unfit for further military service. The Medical Board, which was composed of three medical officers, recommended that plaintiff appear before a Physical Evaluation Board.

8. On July 30, 1953, plaintiff appeared before a Physical Evaluation Board consisting of three officers, one of whom was a medical officer, convened at Brooke Army Hospital. The Board found plaintiff physically unfit to perform the duties of his office, rank, or grade by reason of physical disability incurred while entitled to receive basic pay as a regular member. The following comment was made after his appearance before the Board:

> The Board, after making a thorough study of the medical records, Medical Board Proceedings, and other allied papers, as well as examining the individual and considering his voluminous testimony, considers there are two diagnoses in this case: (1) Degenerative joint disease, multiple, with two X-ray findings of minor joints involved, with exacerbations occasionally; disability rating, twenty percent. (2) Strain, chronic, moderate, with pain on motion of the left primarily; disability rating, ten percent. The Board feels that there is just a question of doubt as to the physical qualifications of this officer to continue on duty, and has given him the benefit of the doubt and declared him unfit for service. The combined disability rating of thirty percent is given. No medical witnesses were called during the hearing.

9. By letter dated August 12, 1953, The Adjutant General advised the plaintiff, in pertinent part, as follows:

> 1. The record of proceedings of the Physical Evaluation Board convened 30 July 1953, at Brooke Army Hospital, Fort Sam Houston, Texas, in your case, has been reviewed by the Army Physical Review Council,

a board appointed by the Secretary of the Army. The evidence of record does not clinically confirm the existence of any disability of a degree which would preclude the performance of military duty. You are considered to be physically fit to perform the duties of your office and rank.

2. Prior to final action being taken on your case, if you desire to render a rebuttal based upon the above, such written statement must be prepared and returned within seven (7) days after receipt of this communication.

10. By 1st indorsement dated August 21, 1953, plaintiff submitted a five-page letter to The Adjutant General in rebuttal of the findings of the Army Physical Review Council. On August 26, 1953, The Adjutant General referred plaintiff's file, including plaintiff's rebuttal statement, to the Army Physical Disability Appeal Board for remark and recommendations. On August 31, 1953, the Army Physical Disability Appeal Board concurred in the findings of the Army Physical Review Council.

11. By letter dated September 4, 1953, The Adjutant General advised the plaintiff as follows:

The record of proceedings of the Physical Evaluation Board before which you appeared at Brooke Army Hospital, Brooke Army Medical Center, Fort Sam Houston, Texas, on 30 July 1953, and your rebuttal of 21 August 1953, have been reviewed by the Army Physical Disability Appeal Board. This Board concurs in the findings of the Army Physical Review Council that you are physically fit for general military service. Therefore the papers in your case have been filed.

12. By 1st indorsement dated September 11, 1953, the plaintiff complained to The Adjutant General that his rights

had not been fully safeguarded. He asserted that he had not been advised of the specific reason for the modification of the findings of the Physical Evaluation Board by the Physical Review Council and contended that without such information he had been deprived of an opportunity to file a rebuttal. Plaintiff requested that his protest be referred to the Secretary of the Army, and that in the event such request was not favorably considered, he be permitted to resign from the Army effective October 31, 1953.

13. By letter dated September 29, 1953, The Adjutant General advised plaintiff as follows:

> 1. The proceedings of the Physical Evaluation Board in your case, the findings of the Army Physical Review Council, and your rebuttal thereto, together with your First Indorsement, 11 September 1953, were resubmitted to the Army Physical Disability Appeal Board for further consideration. After a further careful review of your case, the Army Physical Disability Appeal Board reaffirms its decision of 31 August 1953, that you are considered physically fit to perform the duties of your office and rank.
>
> * * * * *
>
> 3. If you desire to resign, it is suggested that your request for resignation be submitted through channels in accordance with Paragraph 2, AR 605-275. Upon receipt of such request it will be given consideration.

14. On October 20, 1953, the plaintiff tendered his unqualified resignation to The Adjutant General with the request that it be effective on or before November 30, 1953. Plaintiff stated in his letter that in his opinion he was not physically qualified for the performance of military duty. He also expressed dissatisfaction with the manner in which his appeals to the Army Physical Review Council's action has been conducted and the concurrence of the Army Physi-

cal Disability Appeal Board with the action of the Physical Review Council.

15. The Inspector General, Fourth Army, Fort Sam Houston, conducted an investigation during the period October 22, 1953-October 30, 1953, concerning the plaintiff's contentions that the Physical Review Council failed to give any reasons for its departure from the findings of the Physical Evaluation Board. The Inspector General, Fourth Army, concluded that the plaintiff had not been advised of the reasons for or "the specific items of disagreement" which formed the basis for the action of the Physical Review Council. Further, it was concluded that this asserted lack of specific information precluded the plaintiff from directing his rebuttal to any specific point. The conclusions of the Inspector General of the Fourth Army were approved by the Commanding General, Fourth Army.

16. The Report of Investigation was forwarded by the Commanding General, Fourth Army, Fort Sam Houston, Texas, to The Inspector General, Department of the Army, Washington, D.C. The letter of transmittal, dated November 18, 1953, contained the following comments:

> 1. The attached approved report of investigation, which pertains to a matter beyond the jurisdiction of this headquarters, is forwarded under the provisions of paragraph 13b, AR 20-30.
>
> * * * * *
>
> 3. In the light of the statement contained in DA Pamphlet 21-48, dated 14 January 1952, to the effect that an individual has a right to send in another statement "on the point of disagreement," it is the opinion of this headquarters that if the findings and recommendations of the Physical Evaluation Board are reversed the individual concerned should be advised of the specific point of disagreement in order that he may submit a rebuttal to the point in question.

17. By Disposition Form, dated January 29, 1954, The Inspector General requested The Adjutant General to advise the Commanding General, Fourth Army, substantially as follows:

> The Assistant Chief of Staff, G1, DA, has advised that the statement furnished Lt. Col. Imhoff in letter from the Army Physical Review Council dated 12 August 1953 that "the evidence of record does not clinically confirm the existence of any disability of a degree which would preclude the performance of military duty" is considered sufficiently definitive to permit preparation of rebuttal within the purview of paragraph 4, page 15 of DA Pamphlet 21-48, dated 14 August 1953.
>
> It is not required by law or regulations, nor is it the policy of the Department of the Army to provide in minute detail the differences in evaluations between the Army Physical Review Council (APRC) and the Army Physical Disability Appeal Board (APDAB) on the one hand and the evaluation by a Physical Evaluation Board on the other hand. The decisions of the APRC and the APDAB are based on a consideration and review of the evidence presented in accordance with AR 15-160, AR 40-680 and SR 600-450-5.
>
> Inasmuch as records disclose that Lt. Col. Imhoff has been afforded consideration of his case and of rebuttal to findings of both the Army Physical Review Council and the Army Physical Disability Appeal Board, it is the view of the Department of the Army that Lt. Col. Imhoff has had full and fair hearing upon the question of his fitness for duty as provided in current regulations and policies.

By letter dated January 29, 1954, the Commanding General, Fourth Army, was notified accordingly.

18. On February 16, 1954, plaintiff underwent a physical examination at Fort Sam Houston, Texas. The Report of Medical Examination indicated that the plaintiff was not qualified "for active duty as per Par 60t, AR 40-105." The Surgeon General, under date of April 8, 1954, advised The Adjutant General that "Since the final type physical examination indicates that this officer is physically incapacitated for duty, it is recommended that he appear before a medical board and, if indicated, a physical evaluation board."

19. On April 23, 1954, plaintiff entered Brooke Army Hospital for study and examination for appearance before a medical board. On June 9, 1954, plaintiff appeared before a Disposition Board convened at Brooke Army Hospital. The Board found that the plaintiff was permanently unfit for further military service and recommended that the plaintiff appear before a Physical Evaluation Board.

20. On June 11, 1954, the plaintiff appeared before a Physical Evaluation Board convened at Brooke Army Hospital. The Board found plaintiff physically unfit to perform the duties of his office, rank, or grade by reason of physical disability, and evaluated the total disability at 40 percent, based on the following diagnoses:

1. Neuralgia, n.e.c., left, cervical spinal nerve roots, chronic; secondary to (2).

2. Degenerative joint disease, multiple, due to unknown cause, cervical and lumbar spine.

3. Strain, chronic, moderate, lumbosacral ligaments, cause, undetermined; manifested by pain, limitation of motion, slight lumbar scolosis with convexity to the left and slight tenderness of the paravertebral area with some spasm of the paravertebral muscles.

21. On June 25, 1954, the Army Physical Review Council reviewed the proceedings of the Physical Evaluation Board

of June 11, 1954, and recommended that the findings be modified to show the plaintiff to be physically fit.

22. By letter dated June 29, 1954, The Adjutant General advised plaintiff that the record of proceedings of the Physical Evaluation Board convened June 11, 1954, at Brooke Army Hospital, had been reviewed by the Army Physical Review Council and that "The evidence of record does not reveal the presence of any disability of a degree which would preclude the performance of active military duty. You are considered to be physically fit." Plaintiff was further advised that he could submit a rebuttal prior to final action being taken on his case.

23. By 1st indorsement dated July 12, 1954, plaintiff submitted over four pages of remarks relating to his medical history but specifically stated that his comments were not intended as a rebuttal.

24. On July 13, 1954, The Adjutant General referred the file to the Army Physical Disability Appeal Board for remark and recommendation. The Adjutant General, under date of July 15, 1954, was advised that the Army Physical Disability Appeal Board concurred in the findings of the Army Physical Review Council.

25. (a) On July 19, 1954, plaintiff underwent a physical examination at Fort Sam Houston. The examiners concluded that plaintiff was not qualified for active duty and recommended that he be separated for physical disability.

(b) By letter to The Adjutant General dated July 19, 1954, plaintiff requested that action on his letter of resignation be held in abeyance pending receipt of further advice from him. The Adjutant General advised plaintiff on July 22, 1954, that his request for withdrawal of his tender of resignation was approved.

26. In November 1954, plaintiff was transferred from Fort Sam Houston to Washington, D.C.

During the period from March 28, 1955, to January 31, 1956, plaintiff was given out-patient treatment at Walter Reed Army Hospital. The clinical records and medical cards were requested and received from Brooke Army Hospital, Fort Sam Houston, Texas. Plaintiff was examined in the Neurology Clinic, Physical Medicine Clinic, Orthopedic Clinic, and Peripheral-Vascular Clinic, and X-rays were taken of plaintiff's spine.

27. (a) A Walter Reed Physical Medicine Clinical Record, dated May 5, 1955, and signed by the Chief of the Physical Medicine Service, discloses, in part, as follows:

> * * * he [plaintiff] asked for a letter excusing him from a period on the rifle or pistol ranges which he stated he was to attend in the near future, and this was refused. He was informed that no significant reason could be found for granting such an excuse, particularly in view of the fact that he stated his symptoms were on the left and he fired with his right arm. He was further advised that if he still desired such a letter, it would have to come from the referring Physician, and not from a consultant service. * * *

The record further discloses that on May 18, 1955, the Assistant Chief of the Out-Patient Service did recommend that plaintiff be excused from field activities and range firing until plaintiff's treatment was completed and a final determination of the limitation of his activities had been made.

(b) In late January 1956, plaintiff was given a final-type physical examination at Walter Reed. The examiners concluded that he was qualified for retirement.

28. An Officer Efficiency Report, covering the period June 1, 1955, to May 31, 1956, discloses that, based on close daily contact with plaintiff, the rating officer stated that plaintiff possessed the physical, mental, and moral qualities for

his grade, branch, and length of service; and that plaintiff could be expected to serve adequately in any normal branch assignment commensurate with his grade. Plaintiff's performance was rated as "outstanding performance of duty found in very few officers." It was also the rating officer's opinion that plaintiff would give outstanding performance when promoted to the next higher grade. During this rating year, plaintiff took 35 days' leave and was on sick leave for 13 days.

29. By letter dated July 31, 1956, plaintiff was advised by The Adjutant General that he would be retired by operation of law on November 30, 1956, pursuant to "Section 514 (d)(4) of the Officer Personnel Act of 1947 (Par. 13, AR 635-130, dated 22 December 1955) [which] requires the retirement of Regular Army permanent lieutenant colonels 30 days after the date of completion of 28 'years' service'."

30. Plaintiff underwent a Final Type Physical Examination at the U.S. Army Dispensary, The Pentagon, Washington, D.C., on September 4, 1956, and was found qualified for general service. He was given a Physical Profile of

P U L H E S.
1 2 1 1 1 1.

Plaintiff made the following statement in connection with his physical condition:

> In the past three years I have appeared before four (4) boards of officers at Brooke Army Hospital and three (3) at Fort Sam Houston and all seven (7) have found me unfit for military duty.

31. Plaintiff was admitted to the Fort Belvoir Hospital on September 6, 1956, and discharged to duty on October 4, 1956. He entered for a general evaluation prior to discharge from the service in regard to a mass in the right upper quadrant of the abdomen and also arthritis of the

spine. A narrative summary of his Fort Belvoir hospitalization discloses the following:

> * * * X-ray of the cervical spine revealed minimal anterior osteophyte formation on the bodies at C-4, C-5, and C-6. The cervical spine is otherwise normal. Examination of the dorsal spine and lumbar spine revealed very minimal anterior lipping of the bodies of the upper and middorsal region and in the midlumbar region. There were no other significant findings. Sacral ileacs are normal. There are several calcified mesenteric nodes in the right mid abdomen. On the 28th of September a lipoma was removed from the right abdominal wall. Was seen by the Orthopedic Department and felt he had no disabling arthritis, although, per x-ray evidence of minimal osteoarthritis are seen.
>
> *Diagnosis:*
>
> 2144—Lipoma, abdominal wall, removed.
> 7250—Arthritis, n.e.c., spine, condition unchanged.

32. On November 14, 1956, the Secretary of the Army ordered that plaintiff report at the earliest practicable date to the Commanding Officer, Walter Reed Army Medical Center, for observation, necessary treatment, appearance before a medical board and, if warranted, before a physical evaluation board. By letter of the same date, The Adjutant General sent the medical records to Walter Reed Hospital and advised that the case would be processed in accordance with AR 635-40A and AR 635-40B. This letter further stated as follows:

> 4. Attention is invited to the fact that Colonel Imhoff is scheduled to be retired mandatorily on 30 November 1956 under the provisions of Section 514(d)(4), Officer Personnel Act of 1947. Therefore, his retirement for

any cause cannot be effected later than 30 November 1956. It is desired that all action in this case be expedited and that the medical board or physical evaluation board proceedings be completed in time to be received in the Department not later than 26 November 1956.

33. Plaintiff was admitted to Walter Reed Army Hospital on November 15, 1956, where he underwent extensive physical examinations, consultations, and evaluations in the Walter Reed Army Medical Center.

34. A Board of Medical Officers convened at Walter Reed Army Hospital on November 21, 1956, made the following findings and recommendations:

Diagnosis:

7230 1. Degenerative joint disease (osteoarthritis), multiple, minimal, involving the cervical and lumbar spine; cause undetermined; manifested by x-ray evidence of arthritic changes, slight limitation of motion and subjective complaint of pain; unchanged. LOD: Yes.

8331 2. Strain, lumbosacral, bilateral, minimal; unchanged. LOD: Yes.

• • • • •

Degree of Disability for Military Service:
None

Type Service Recommended:
General

Qualified for Overseas:
Yes

State Disability Briefly in Nontechnical Language:
None

The Board Recommends That:

Lt. Colonel Joseph J. Imhoff, O51009, be returned to full military duty, commensurate with age, rank and experience.

The Clinical Abstract attached to the Medical Board Proceedings concluded as follows:

Present Condition: At the present time, the patient is having very little discomfort and is asymptomatic except for a small tender area on the sacrum. He states, however, that with weather changes and at times with sudden position changes, he does have an increase in pain in his low back and some discomfort in his neck and left shoulder. He also states that he has discomfort and a feeling of swelling in the hands and tightness in the joints of his fingers in the morning; however, this disappears after a few minutes of use. As long as the patient keeps from becoming cold, controls his activity, does not find himself in the position of too much tension at work, and avoids sudden movements, he is relatively comfortable and virtually symptom-free.

Recommendations: It is the opinion of the Chief of General Medicine Service #2 that the patient has received maximum benefits from hospitalization, that he is fit for general military duty commensurate with his age, rank, and experience and it is recommended that he be therefore returned to duty.

35. By Order of the Secretary of the Army, dated November 29, 1956, plaintiff was advised by The Adjutant General, in part, as follows:

1. In view of your desire to remain on active duty subsequent to 1 January 1957 in order to take advantage of the benefits of the recently enacted Servicemen's and Veterans' Survivor Benefits Act, orders

have been issued, extract copy inclosed announcing your retirement effective 30 November 1956, recall to active duty 1 December 1956 and relief from active duty 31 January 1957.

* * * * *

3. It has been determined that you are physically qualified for retirement.

36. Plaintiff, by letter dated December 24, 1956, advised The Adjutant General that he objected to the determination that he was physically qualified for retirement notwithstanding the "medical examinations as may have been made at Fort Belvoir Army Hospital and Walter Reed Army Hospital in 1956." Plaintiff further contended therein that he "should have been retired effective 30 November 1956 with a minimum of forty percent (40%) permanent physical disability." In reply thereto, plaintiff was advised by The Adjutant General on January 11, 1957, that it was determined by The Surgeon General that plaintiff was physically qualified for active military service; and that if plaintiff believed there had been an error or injustice, he might desire to apply to the Army Board for Correction of Military Records for a review of his case.

37. By application dated February 9, 1957, plaintiff requested the Army Board for Correction of Military Records to change "My discharge from U.S. Army effective 1 December 1956 * * * to provide for not less than 'Forty Percent' (40%) Permanent Physical Disability." Under date of May 8, 1957, plaintiff was advised that following examination and consideration of his Army records, together with such facts as were presented by plaintiff, the Army Board for Correction of Military Records on April 24, 1957, determined that insufficient evidence had been presented to indicate probable material error or injustice; and that his application was denied.

38. Plaintiff filed an application dated February 23, 1957, with the Veterans Administration for disability compensation or pension.

39. As a result of a medical examination conducted by the Veterans Administration, including a neurological examination and X-rays of the cervical, thoracic, and lumbosacral spine, plaintiff was rated by the Veterans Administration on August 14, 1957, as follows:

J. Original claim.

I. Service connection for residuals of back injury—Lumbar and cervical arthritis, and neuritis.

F. Service records show diagnosis November 1950, of acute strain, lumbar muscles, etiology unknown (no history of trauma). The service records show recurrent treatment for back pain and the diagnosis of degenerative joint disease, multiple, due to unknown cause, and strain, ligaments of lumbosacral region, chronic, cause undetermined, were made in 1953, and 1954, and the claimant was admitted to Walter Reed Army Hospital 11-15-56, for observation, treatment and disposition and returned to duty 11-21-56, with a diagnosis degenerative joint disease, multiple, minimal, involving the cervical and lumbar spine, due to unknown cause, and lumbosacral strain, bilateral, minimal.

VA examination 4-26-57, revealed no evidence of impaired function of the musculoskeletal system, instability or residuals of an injury. X-ray of cervical and lumbosacral spine revealed minimal osteoarthritic changes, consistent with the patient's age. Neurological examination of the patient's back revealed an area of tenderness to palpation pressure at the L-5 and S-1 interspace to the right of the mid-line. There was no evidence of muscle spasm. The diagnosis of

scalenus anticus syndrome on the left, upper extremity was made.

1. Incurred PL 28/82 VR 1(a) Pt. I Par. 1(a) 20% from 2/1/57

5003-723 *Osteoarthritis of the cervical and lumbar spine*
0% from 2/1/57
Neuritis, left upper extremity
0% from 2/1/57
Lumbo-sacral strain
No VB 8-2507—Disabilities stabilized
Rep. Am. Legion.

40. The Veterans Administration, by letter dated August 19, 1957, advised the plaintiff, in pertinent part, as follows:

This is in reference to your compensation claim.

The evidence, including service records and report of examination shows that neuritis, left upper extremity and lumbo sacral strain were incurred in service but are not disabling to a compensable degree. Osteoarthritis of the cervical and lumbar spine, incurred in service is 20 percent disabling.

If you were not in receipt of retirement pay, you would have entitlement to compensation of $33 monthly from February 1, 1957, the date following your discharge from service. However, compensation and retirement pay may not be paid concurrently. Provision is made however for the waiver of so much of a veteran's retirement pay equalling his entitlement to compensation.

41. Dr. Hyman D. Shapiro, a practicing physician in the District of Columbia and a Diplomate in the American Board of Neurology and Psychiatry, testified as a witness on behalf of the plaintiff. There is no evidence in the record indicating that plaintiff was ever examined by Dr.

Shapiro. Dr. Shapiro testified that he agreed with the findings and recommendations of the 1953 and 1954 Disposition and Physical Evaluation Boards that plaintiff was permanently unfit for military service. This witness further testified that he did not see, nor take into consideration, the Medical Board proceedings conducted at Walter Reed Hospital in 1956.

42. Colonel Walter A. Kostecki, MC, USA, Post Surgeon, Fort Myer, Virginia, testified as a witness for plaintiff. Colonel Kostecki had examined and treated plaintiff in 1953, while serving as Post Surgeon at Fort Sam Houston, San Antonio, Texas. This witness, in testifying as to plaintiff's condition in 1953, testified in part as follows:

> Q. Did you feel when you saw him on these occasions that he was able to carry on his full military duties?
>
> A. That was not for me to say as a surgeon, that is why I referred him to the hospital. That is why my job was much easier.

Colonel Kostecki testified that he did not personally examine plaintiff in 1954, but did concur at that time in the 1954 examinations that found plaintiff not qualified for active service. He was further of the opinion that plaintiff was unfit for duty in 1956, although he had not examined plaintiff since 1953.

43. Major James W. Ransone, MC, USA, who at the time of the trial of this case was Chief, General Medicine Section No. 3, and Consultant in Arthritis and Rheumatology, at Walter Reed General Hospital, and also Assistant Chief Medical Consultant to the Surgeon General, testified as a witness for the defendant. Major Ransone is certified by the American Board of Internal Medicine and regularly examines and treats arthritic patients. From his review of the records, he was of the opinion that, at the time of plaintiff's release from active duty in 1956, plaintiff was fit for duty commensurate with his age, grade, and experience;

that based on well-established medical principles, plaintiff's arthritis would be best classified as mild or minimal; and that soldiers are retained on active duty with a diagnosis of mild arthritis. Major Ransone further testified that upon the basis of the records in the case he would have recommended in November of 1956 that plaintiff be returned to duty; and that, in his opinion, plaintiff was even fit for duty in 1953, commensurate with plaintiff's age, grade and experience, and according to the regulations that were in effect at that time.

44. Major Melvin D. Cheitlin, MC, USA, who at the time of the trial of this case was serving as Chief of Cardiology at Madigan General Hospital, Tacoma, Washington, testified on behalf of defendant. Major Cheitlin is medically certified by the American Board of Internal Medicine. He physically examined plaintiff at Walter Reed Hospital in November of 1956, just prior to plaintiff's release from active duty. Major Cheitlin testified that it was his impression, after taking plaintiff's history and conducting a physical examination, that plaintiff, in November 1956, had lumbosacral strain, which was minimal at that time, and minimal cervical and lumbar osteoarthritis of the spine; and that "on the basis of the examination, both by the doctors on the ward and by the consultants who saw the patient, with observation of patient at that time on the ward, and taking into account the entire previous history, that at that time, in November of 1956, this man [plaintiff] was considered to be fit for active military service in accordance with his age, rank and experience." He testified that men in the uniformed services are retained on active duty where there has been a confirmed diagnosis of mild and/or moderate arthritis.

Major Cheitlin further testified that he was a member of the Medical Board that convened at Walter Reed Army Hospital on November 21, 1956, to consider plaintiff's case; that he has had occasion to sit and serve as a member of

physical evaluation boards; and that from a recent review of the 1956 Walter Reed medical records, he was still in agreement with the opinion of the Medical Board, which, on November 21, 1956, recommended that plaintiff "be returned to full military duty, commensurate with age, rank, and experience."

45. Summarizing the evidence most favorable in support of disability retirement, the record shows that on July 30, 1953, a Physical Evaluation Board found plaintiff physically unfit to perform the duties of his office, rank, or grade by reason of physical disabilities which were given a combined rating of 30 percent.

Again, on June 11, 1954, plaintiff appeared before a Physical Evaluation Board, which found him unfit to perform the duties of his office, rank, or grade by reason of physical disabilities evaluated at 40 percent. It would appear that in the two instances mentioned, the Army authorities could have allowed disability retirement for plaintiff. However, the favorable findings of the two Physical Evaluation Boards cited were reversed upon review by appellate agencies created for the specific purpose of reviewing the proceedings and findings of the lower boards. The evidence does not support a finding of gross error or arbitrary action by such appellate agencies.

On several other occasions, a finding was made by a board of officers or as a result of a medical examination to the effect that plaintiff was physically unfit for military duty without assignment of any percentage evaluation of the disabling conditions found. Such findings or recommendations were never approved following review by appropriate appellate agencies of the Army.

46. Based upon a careful review of the complete record, it is found that the action of the Department of the Army, in denying disability retirement in this instance, was not arbitrary, capricious, or grossly erroneous and was supported by substantial evidence.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover, and the petiton is dismissed.

APPENDIX B

DEPARTMENTS OF THE ARMY AND
THE AIR FORCE

WASHINGTON 25, D.C., *14 January, 1952*

DA PAMPHLET 21-48/AFPAM 34-4-1, is published for the information and guidance of all concerned.

[AG 461 (14 Dec 51)]

BY ORDER OF THE SECRETARIES OF THE ARMY AND THE AIR FORCE:

OFFICIAL:

WM. E. BERGIN
Major General, USA
The Adjutant General

J. LAWTON COLLINS
Chief of Staff, United States Army

OFFICIAL:

K. E. THIEBAUD
Colonel, USAF
Air Adjutant General

HOYT S. VANDENBERG
Chief of Staff, United States Air Force

DISTRIBUTION:

Active Army:
SPECIAL DISTRIBUTION.
NG: None.
ORC: None.
Air Force:
X: All AF hospitals.

For explanation of distribution formula, see AFR 5-4.

INTRODUCTION

This booklet is for YOU as a physically disabled member of the Armed Forces or a member whose disability may eventually be established. Its purpose is to acquaint you with the steps of processing that are ahead of you, and to answer some of the most frequently asked questions about retirement or discharge for physical disability.

What do the laws say about disability retirements or separations? What procedures must be followed? What rights and benefits can disabled persons obtain? Why should each person separated or discharged for disability apply for Veterans Adminstration compensation? You will find the answers to many such questions in this booklet. You can get more complete information when you are interviewed and oriented during your processing. As questions arise in your own mind about your particular case, jot them down for use during your interviews.

You won't find here the answers to ALL your questions because there are too many laws and regulations affecting physical disability cases to include in a small booklet. Instead, this is an effort to cover the general facts.

It should be kept in mind that the information contained herein is intended to serve *all* members of *all* branches of the Armed Forces—enlisted and officer; male and female. Inasmuch as there may be some variance from terms or procedures in this material by any one of the Services, the reader should not expect his individual case to follow exactly the procedures outlined herein; neither should he be upset if he runs into some process not completely covered here, or if the boards he eventually deals with have different names from those listed here. This booklet will give the reader a good picture of what to expect, and make some suggestions as to how best to meet different situations.

It will be to your advantage to read through this booklet now—and then *keep it in a handy place for future reference.*

If you don't happen to be in the mood for reading, your first impulse may be to throw it away. Don't do it. If you do, you may regret it a few weeks or months from now! This booklet may pay dividends if you will put it where you can refer to it when you're looking for the answer to a puzzling question.

• • •

WHAT LAWS ARE WE TALKING ABOUT?

LAWS RELATING TO RETIREMENT AND SEPARATION

1. Career Compensation Act of 1949, Title 4. Effective 1 October 1949.

2. Servicemen's Indemnity and Insurance Acts of 1951 (P. L. 23, 82d Congress). Effective 25 April.

3. Universal Military Training and Service Act, as amended (P. L. 51, 82d Congress). Effective 19 June 1951.

4. Servicemen's Readjustment Act of 1944. (Section 302 and others commonly called the GI Bill of Rights.)

5. Vocational Rehabilitation Act (P. L. 16, 78th Congress) as amended by P. L. 894, 81st Congress.

Any or all of these laws may have some effect, now or later, on your specific case. In laymen's language, they provide that—

Any member of the Armed Forces found unfit for the performance of duty because of a disability of 30 percent or more which was incurred while the member was entitled to receive active duty pay and not as a result of intentional misconduct or willful neglect and which was *not* incurred during a period of unauthorized absence, may either be placed on the Temporary Disability Retired List or be permanently retired for physical disability *if he is otherwise qualified.*

If the member has less than 8 years of active service, the disability must be the "proximate result of the perform-

ance of active duty." Any disability shown to have been incurred in line of duty during active service in time of war or national emergency, the present Korean activity included, fulfills this requirement.

In 1949 Congress extended disability benefits to enlisted personnel on the same relative basis as for officer personnel.

The law requires at least 30 percent disability for any person to be retired with less than 20 years of active service. It relates the amount of retirement pay to the degree of disability or to the years of active service, whichever the individual chooses. Disability retirement pay, in general, is figured by multiplying the monthly basic pay of the highest grade satisfactorily held by (a) the number of years of active service multiplied by 2½ percent or by (b) the percentage of disability. However, disability retirement pay cannot be more than 75 percent of the basic pay.

If monetary payment is authorized for a disability of less than 30 percent, with less than 20 years of active service, it is awarded as lump-sum *severance* pay instead of monthly retirement pay.

• • •

THE FIRST BOARD

Your first step is to appear before a board of medical officers—generally three doctors. In the Army and Air Force, it will be called a Medical Board, and in the Navy or Marine Corps it will be called a Clinical Board. Its job is to find out exactly what your physical condition is, and to recommend a way of handling your case.

The board will make one of six proposals to the Commanding Officer of the hospital:

1. Send you back to regular duty.

2. Send you back to limited duty; that is, duty you can perform satisfactorily in spite of your disability. This might be done at your request.

3. Continue hospitalization pending another examination later on.

4. Transfer you to another hospital better equipped to handle your particular ailment.

5. Put you in for an administrative separation. That is, find you physically fit, but recommend separation or discharge because of inaptitude for military service or because you are not amenable to discipline, for example.

6. Send your case on to a Physical Evaluation Board (PEB).

If the board makes the first, second, or fifth choice in your case, you won't need to read much farther in this booklet. You are not considered disabled for retirement or separation purposes. If it makes the third or fourth choice, it is simply putting off a decision because your condition hasn't become clear yet. Only the *last* of the six choices can lead to a retirement or separation for physical disability. Your case then goes to a PEB; however, if your disability is considered to have existed prior to entry in active duty, and has not been aggravated by military service, you may waive consideration by a PEB and apply for immediate separation.

What Does PEB Mean?

A Physical Evaluation Board does just what it names suggests—it *evaluates* your physical condition. That is, it studies various reports about you to determine your physical qualifications relative to retirement, separation, or retention on active duty. It does not make *decisions;* it passes its recommendations along to higher echelons.

The PEB is made up of a number of officers, at least one of whom is a doctor. The others may be specialists in other fields. The PEB is not a function of the Medical Department of your Service; it is a function of the Service as a whole. It is not administered by the hospital at which it

meets. When a patient's case goes to the PEB, the hospital maintains administrative custody only.

• • •

WHAT DOES THE PEB RECOMMEND?

Whether you or just your papers go before the PEB, the meeting will be formal with witnesses being sworn and counsel or interested parties representing one or both sides. A recorder and a reporter are there to keep exact records of the proceedings.

The PEB's in each Service are run according to regulations of that Service, but the recommendations they must make in order to qualify you for a disability retirement or separation are the same for all Services. These are—

1. That you are unfit to perform the duties of your rank.

2. The percentage of your disability.

3. That your disability is the "proximate result of performance of active duty," unless you have 8 years or more of active service.

4. That it was incurred while you were entitled to receive basic pay.

5. That it was not due to your own willful misconduct, negligence, or during an unauthorized absence.

6. That your disability either IS permanent or MAY BE permanent.

REBUTTAL

Whether you do or do not attend the PEB hearing, you will be told officially about its findings and furnished a copy of the proceedings very soon. Then within a specified time you must submit a written statement agreeing with the recommended findings, or a rebuttal stating why you disagree. For instance, you might feel that the percentage of disability the board put down for you is not a fair esti-

mate. Your counsel before the PEB, or some other hospital staff member, will help you write a simple, straightforward letter explaining your opinion. This letter becomes part of your record which is sent to the office of the Secretary of your branch of Service.

• • •

Your Records Go to Washington

The PEB's recommendations will be sent to Washington along with your written statement and all the records that the PEB looked over. In Washington each of the Services has a Physical Review Council or Board to go over the merits of each recommended case.

Members of the PRC, or PRB as the case may be, represent the various staff agencies of your Service that have dealings with personnel retired or separated for disability. No patient ever appears in person before the PRC. Only records are reviewed.

What Might the PRC Do?

After studying all your records, the PRC could take any one of the following actions:

1. It could send your records back to the original Medical or Clinical Board requesting further information in which case the records would be returned to the PRC.

2. It could send them back to your PEB and ask that board to reconsider its original recommendations. If the PEB changes its mind on any point, you may write another letter expressing your opinion on the new recommendations.

3. It could agree with the recommendations of the PEB and send the records on to the Secretary of your Service for final action.

4. It could disagree with the PEB recommendations and notify you that you have the right to send in another statement, on the point of disagreement.

If the PRC and PEB Disagree

If you feel that the point of disagreement between the PEB and PRC reports will NOT prevent your retirement or separation or affect the amount of retirement or severance pay you would get, you may decide not to write further arguments in your behalf. If the PRC hears that you do not wish to enter a rebuttal, it will forward to the Secretary all your records plus its own report. It will then be up to the Secretary of your Service to make a final decision.

However, if you feel that the PEB findings were more to your advantage than those of the PRC, you probably *will* want to send in a statement to that effect. By doing so, you will automatically bring in another board in Washington—a Physical Disability Appeal Board (PDAB).

The PDAB will review all of the proceedings and recommended findings of the PEB and PRC and then resolve these into a recommendation of its own which goes to the appropriate Secretary for final decision.

You will have reached the point of maximum hospital benefits before appearing before the Physical Evaluation Board. While waiting for the final outcome to be handed down from the Secretary of your Service you might be held at the hospital where you received treatment, put on a limited duty status, put on detached duty at your home, or given leave if you have any accumulated. What will happen to you during this waiting period depends on the characteristics of your case and the regulations of the Service you are in.

When all this process has been completed, the Secretary of your Service will hand down his order. You will know if you are to be retired, and if so, whether it is to be temporary or permanent, and what percentage the Service considers your disability to be; or, whether you will be separated with or without severance pay.

Now that you have an idea of what is in your immediate future, let us take a look at the various kinds of separation for disability.

• • • •

Note: *The 1953 Edition of D.A. Pamphlet 21-48, which is identical in applicable content was issued August 14, 1953 with the following Certificate of Authorization.*

It appears in the certified record as plaintiff's exhibit 18.

• • • •

DEPARTMENTS OF THE ARMY, THE NAVY,
THE AIR FORCE, AND THE TREASURY
WASHINGTON 25, D. C., *14 August 1953*

DA PAMPHLET 21-48/NAVPERS 15863/AF PAMPHLET 34-4-1/NAVMC 1075/CG 283, is published for the information and guidance of all concerned.

[AG 461 (4 Jun 53)]

BY ORDER OF THE SECRETARIES OF THE ARMY, THE NAVY, THE AIR FORCE, AND THE TREASURY:

OFFICIAL:

WM. E. BERGIN
Major General, USA
The Adjutant General

J. LAWTON COLLINS
Chief of Staff
United States Army

OFFICIAL:

JOHN GINGRICH
Rear Admiral, USN
Deputy Chief of Naval Operations
(Administration)

J. L. HOLLOWAY, JR.
Vice Admiral, USN
Chief of Naval Personnel

OFFICIAL:

K. E. THIEBAUD
Colonel, USAF
Air Adjutant General

N. F. TWINING
Chief of Staff
United States Air Force

OFFICIAL:

R. H. RIDGELY, JR.
Brigadier General, U. S. Marine Corps
Director of Personnel

LEMUEL C. SHEPHERD, JR.
General, U. S. Marine Corps
Commandant of the Marine Corps

OFFICIAL:

J. A. HIRSHFIELD
Chief, Office of Personnel

MERLIN O'NEILL
Commandant, United States Coast Guard

APPENDIX C

ARMY REGULATIONS
No. 15-160

DEPARTMENT OF THE ARMY
Washington, 25, D. C.
20 August 1953

BOARDS, COMMISSIONS, AND COMMITTEES

DEPARTMENT OF THE ARMY PROCEDURES IN PROCESSING CASES UNDER TITLE IV, CAREER COMPENSATION ACT OF 1949

* * * * *

Section I

ARMY PHYSICAL REVIEW COUNCIL

1. Purpose.—The Army Physical Review Council, hereinafter referred to in these regulations as the Council, was established under the authority of sections 413 and 414a of the Career Compensation Act of 1949 (63 Stat. 824 and 825; 37 U.S.C. 283 and 284) for the purpose of reviewing all cases considered by physical evaluation boards; all cases arising under the provisions of section 411 of the act; and such other cases as may be referred to it for consideration.

* * * * *

4. Functions when considering physical evaluation board cases.—The Council may concur with or disapprove the recommended findings of the physical evaluation board.

a. *Action when approval is unanimous.*—When members of the Council unanimously concur with all the recommended findings of the physical evaluation board, findings of the Council are final, except for submission to The Adjutant General for action of the Secretary of the Army.

b. *Action when disapproval is unanimous.*—When members of the Council unanimously disapprove one or more of the recommended findings of a physical evaluation board, they may—

(1) Return the case to the physical evaluation board for reconsideration, or

(2) Substitute new findings for any or all of the recommended findings of the physical evaluation board.

(a) If the new findings affect the ultimate disposition of the member, lower the amount payable to him, or adversely affect his rights under the Economy Act of 1932 (47 Stat. 406; as amended; 5 U.S.C. 59a), the case, with the action of the Council, will be referred to The Adjutant General who will notify the member concerned by registered mail, return receipt requested, or, in cases of mental incompetency, the person notified of the member's rights prior to the physical evaluation board hearing, of the recommended new findings, and that he has 7 days, or such additional time as may be allowed by The Adjutant General, to file a rebuttal thereto or a statement of acceptance. A new finding of "permanent" instead of "may be permanent" when made at the request of the member in accordance with existing regulations is not considered to be a change in the ultimate disposition of the member.

1. If such member or person submits a statement that he does not wish to file a rebuttal, or if an answer is filed indicating acceptance of the new findings by the Council, the findings of the Council will be considered final, except for the action of the Secretary of the Army.

2. If a rebuttal is filed by such member or person which indicates disagreement with the action of the Council, the complete proceedings and rebuttal will be forwarded by The Adjutant General to the Army Physical Disability Appeal Board for consideration and action.

3. If within the allotted 7 days or such additional time as has been allowed by The Adjutant Gen-

eral the member or person fails to submit any statement, either personally or through his counsel and has not made a request for additional time, he will be deemed to have waived his right to file a rebuttal to the new findings and the findings of the Council will be final, except for the action of the Secretary of the Army.

(b) If the new findings do not affect the ultimate disposition of the member, lower the amount payable to him, or adversely affect his rights under the Economy Act of 1932, the action of the Council will be considered final, except for submission to The Adjutant General for the action of the Secretary of the Army.

c. *Action when members of the Council disagree.*—Whenever there is disagreement among the members of the reviewing panel as to the findings or actions to be taken by the Council, each member shall prepare his comments and the case will be referred to the Army Physical Disability Appeal Board for consideration and action.

5. Functions when considering section 411 cases.—The sole responsibility of the Council with regard to cases arising under the provisions of section 411 of the Career Compensation Act of 1949 (63 Stat. 823; 37 U.S.C. 281, Supp. V) is to determine the percentage of disability of members heretofore retired or certified for retirement pay for physical disability, on the basis of the member's disability at the time of retirement, or at the time certified for retirement pay. The percentage of disability will be determined in accordance with the Veterans Administration Schedule for Rating Disabilities, 1945 edition, with extension up to 30 September 1949.

a. After the Council has rated a heretofore retired case and the member concerned has been notified, The Adjutant General will receive all requests for further consideration.

(1) When the request pertains to the percentage rating for physical disability, the case will be forwarded to the Army Physical Review Council.

(2) When the request pertains to computation of pay, the case will be referred to the Finance Office, U. S. Army, Washington 25, D. C.

(3) When the request pertains to computation of length of service, grade, or is of routine nature, The Adjutant General will take the necessary action.

b. When a request for further consideration of a rating is forwarded to the Council, all available records will be reviewed in the light of the new correspondence. When members of the Council unanimously consent, the Council may reaffirm or modify its previous rating. In such cases, The Adjutant General will notify the member concerned of the action taken. If the members of the Council are unable to agree, each member will prepare comments and proposed findings. The case, together with the complete proceedings in the case, will be referred to the Army Physical Disability Appeal Board for consideration and action.

6. Basis for determinations.—The members of the Council will be guided by the law, and applicable regulations, principles, rules, and precedents established by Department of the Army, including medical standards as to fitness or unfitness stated by The Surgeon General, and legal opinions rendered and legal principles established by The Judge Advocate General. For physical evaluation board cases, if physical unfitness has been established, the percentage of disability will be determined in accordance with the Veterans Administration Schedule for Rating Disabilities, 1945 edition, and all extensions thereto. If regulations, principles, rules, or precedents applicable to the case have not been established, the Council will return the case to The Adjutant General, with recommendation, for referral to the Secretary of the Army for instructions.

Section II

Army Physical Disability Appeal Board

7. Purpose.—The Army Physical Disability Appeal Board, hereinafter referred to as the Appeal Board, was established under the authority of section 413 and 414a of the Career Compensation Act of 1949 for the purpose of reviewing—

(1) Cases of a controversial nature to insure that no member is separated or retired from the Army for physical disability without having received a full and fair hearing, and

(2) All section 411 cases referred to it for consideration.

• • • • •

10. Functions when considering physical evaluation board cases.—

a. The Appeal Board will take one of the following actions with regard to cases referred to it for consideration, and return the cases to The Adjutant General:

(1) Concur with the unanimous action of the Council;

(2) Adopt the action proposed by any member of the Council;

(3) Concur with recommended findings of the physical evaluation board; or

(4) Specify other action for the disposition of the member concerned.

b. If action is taken by the Appeal Board which affects the ultimate disposition of the member, lowers the amount payable to him, or adversely affects his rights under the Economy Act of 1932 from that last known by the member, the case will be referred to The Adjutant General who will notify the member concerned or, in the case of mental incompetency, the person notified of the member's rights

prior to the physical evaluation board hearings, of the recommended new findings, and that he has 7 days, or such additional time as may be allowed by The Adjutant General, to file a rebuttal thereto or statement of acceptance. A new finding of "permanent" instead of "may be permanent" when made at the request of the member in accordance with existing regulations is not considered to be a change in the ultimate disposition of the member.

(1) If such member or person files a rebuttal indicating disagreement with the action of the Appeal Board, The Adjutant General will return the complete proceedings and the rebuttal to the Appeal Board for reconsideration.

(2) If such member or person submits a statement that he does not wish to file a rebuttal, or if he files an answer indicating acceptance of the action of the Appeal Board, The Adjutant General will make appropriate disposition without further referral to the Appeal Board.

(3) If within the allotted 7 days or such additional time as has been allowed by The Adjutant General the member or person fails to submit any statement and has not made a request for additional time, he will be deemed to waive his right to file a rebuttal to the new findings, and the findings of the Appeal Board will be final, except for the action of the Secretary of the Army.

* * * * *

By order of the Secretary of the Army:

M. B. RIDGWAY,
General, United States Army
Chief of Staff

Official:

WM. E. BERGIN,
Major General, United States Army
The Adjutant General

Appendix D

DISPOSITION FORM

File No. AGPO-SR 201 Imhoff, Joseph J. 051009

Subject Physical Evaluation Board Proceedings

To President, Army Physical Disability Appeal Board
Room 1E 474, The Pentagon

From Pers Acts Br, TAGO Room 1E739a, The Pentagon

Comment No. 1 Lt Col Rinaldi Ext 52921

In accordance with the recommendation of D/P&A, approved by the Secretary of the Army on 18 November 1949, outlining the establishment, composition, and functions of the Army Physical Disability Appeal Board, the case of Lieutenant Colonel Joseph J. Imhoff, 051009, QMC, is forwarded for remark and recommendation as to action desired.

For the Adjutant General:

E. RINALDI
E. Rinaldi, LtCol, AGC
Chief, RA Unit, Off Sep Sec, PAB, TAGO

Incl.

1. Ltr dtd 29 Jun 54 w/1 ind & 1 incl
2. Action of APRC
3. PEB prcdgs w/allied pprs
4. 201 file

To: Tag

From: Army Physical Disability Appeal Board
Room 1E 475, Pentagon

Date: 15 July 1954

Comment No. 2 Col Herman/55074/ank

The Army Physical Disability Appeal Board concurs in the findings of the Army Physical Review Council in the case of Lieutenant Colonel Joseph J. Imhoff, 051009

QMC-RA. The diagnosis of neuralgia is not considered to be of sufficient severity as to render Lieutenant Colonel Imhoff unfit (see Par 85a SR 40-120-1). Diagnoses 2 and 3, degenerative joint disease and lumbosacral strain do not render him unfit; x-ray evidence shows minimal to normal hypertrophic changes of the cervical and lumbar vertebrae involved with normal lumbosacral spine and sacroiliac joints; evidence of record indicates no progression of symptoms pertinent to his low back since discharge from hospital in 1953 (par 65b SR 40-120-1).

For the President of the Board:

JOHN B. IVES
John B. Ives
Major, AGC
Recorder

Rec'd and noted 16 Jul 54
AGO PAB Off Sep Sec
Regular Army????

Incls.
n/c

Appendix E

13 JULY '54

WFA030
EAB049
EUA181
MM UWFGH

DE UEPDA 114H
M 131855Z
FM TAG WASHDC
TO CG BROOKE ARHOSP AMC FTSAMHOUSTON TEX
DA GRNC

TAG 44204 FROM AGROSR YOUR M111700Z PARA REVIEW OF RECORDS CASE LT COL JOSEPH J IMHOFF 051009 QMC REVEALS ARMY PHYS DISABILITY BD CONCURS IN THE FINDINGS OF THE ARMY PHYS REVIEW COUNCIL THAT SUBJ OFFICER PHYS FIT FOR DY

13/1952ZAUG54

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 354

JOSEPH J. IMHOFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was retired from active Army service as a lieutenant colonel in November, 1956, by reason of length of service. In this suit filed in the Court of Claims in 1958, petitioner complained that he was entitled, instead, to retirement for lack of physical fitness for duty, allegedly beginning in 1953.[1] The

[1] The amount of petitioner's retirement pay does not depend upon whether he is retired for length of service (10 U.S.C. 3916) or for disability (10 U.S.C. 1201). See 10 U.S.C. 3991, 10 U.S.C. 1401. However, there is a difference in the

decision below, rejecting that contention and the assertion of numerous procedural irregularities in the proceedings reviewing the claim of disability, is clearly correct, and further review is unwarranted.

In 1953, a Medical Board at Brooke Army Hospital, Texas, found petitioner physically unfit for further military service by reason of spinal arthritis and a lumbo sacral strain. The Medical Board recommended that he appear before a Physical Evaluation Board. The Evaluation Board felt that "there is just a question of doubt" as to petitioner's fitness to continue on duty and giving him the benefit of that doubt recommended that he be found unfit for service. However, the Army Physical Review Council, after reviewing the findings of the Physical Evaluation Board, ruled that "the evidence of record does not clinically confirm the existence of any disability of a degree which would preclude the performance of military duty." That ruling was affirmed by the Army Physical Disability Board (Pet. App. 12a-13a). The Inspector General of the Army rejected petitioner's contention that he had not been sufficiently advised of the reasons for the action of the Physical Evaluation Record (Pet. App. 15a-16a).[2]

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federal income tax payable on the benefits. See generally, *Espenshade* v. *United States*, 354 F. 2d 332 (Ct. Cl.). Petitioner was awarded the retirement pay of a full colonel with over 30 years' longevity (Pet. App. 9a), which means that he receives 75% of the base pay of a colonel on active duty.

[2] The relationship of these Boards is set out in Army Reg. 15-160 (Pet. App. 41a-46a).

In June 1954, a Medical Disposition Board at Brooke Army Hospital found petitioner unfit for duty, and a second Physical Evaluation Board concurred in that finding (Pet. App. 17a). The Physical Review Council again recommended that petitioner be declared physically fit for duty. That recommendation was again approved by the Physical Disability Appeal Board (Pet. App. 18a).[3]

In November 1954, petitioner was transferred from Texas to Washington, D.C. An Officer Efficiency Report, made by a rating officer for the period June 1, 1955, to May 31, 1956, on the basis of close daily contact with petitioner, stated that his performance of duties was "outstanding", and that he possessed the physical, mental and moral qualities for his grade, branch, and length of service (Pet. App. 19a-20a).

On July 31, 1956, petitioner was advised that he would be retired on November 30, 1956, by reason of the legal requirement (10 U.S.C. 3916) that lieutenant colonels be retired 30 days after completion of 28 years' service (Pet. App. 19a-20a).

On November 15, 1956, petitioner was admitted to Walter Reed Army Hospital, where he underwent extensive physical examinations. A Board of Medical Officers convened at Walter Reed on November 21, 1956, found that he had "minimal" osteoarthritis of

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[3] By letter of July 19, 1954, petitioner requested that action on his tender of resignation (made in October 1953, Pet. App. 14a) be held in abeyance pending receipt of further advice from him. The Adjutant General advised him that his request for withdrawal of tender of resignation was approved (Pet. App. 18a).

the spine and a "minimal" lumbo sacral strain. The Board further found that his degree of disability for military service was "None", and that he was fit for general military duty commensurate with his age, rank and experience (Pet. App. 21a-23a).[4]

After petitioner objected to the determination that he was physically fit for duty, he was advised on January 11, 1957, that the Surgeon General had determined that he was physically qualified for duty. After his discharge, petitioner requested the Army Board for Correction of Military Records to change his discharge to provide for not less than 40% permanent physical disability. That Board denied the application on April 24, 1957, on the ground that insufficient evidence had been presented to indicate probable material error or injustice (Pet. App. 24a).

Petitioner's allegations of procedural errors committed in 1953 and 1954, in the process of review of findings of the Physical Evaluation Boards, are neither germane to the question of his entitlement to retirement benefits based upon physical disability, nor substantial. In 1956, a Medical Board at Walter Reed Army Hospital, immediately after thorough physical examinations, found petitioner fit for general duty. The Army Board of Correction of Military Records denied petitioner's application for re-

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[4] By order of the Secretary of the Army, petitioner was allowed to be recalled to active duty from December 1, 1956, to January 31, 1957, so that he could obtain the benefits of the recently enacted Servicemen's and Veterans' Survivor Benefits Act, 70 Stat. 857 (Pet. App. 23a-24a).

view. Unless the 1956 determination could be overturned, it is not apparent how petitioner could be granted relief. Certainly there is no basis, statutory or otherwise, for granting past retirement benefits of any nature for the years in which petitioner voluntarily remained in active service at a rate of pay higher than the pay he would have received if he had been retired for disability.

Nor is there any merit to petitioner's charges of procedural irregularities in the 1953 and 1954 proceedings. Petitioner contends (Pet. 9-10) that the Army Physical Disability Review Board prejudged the case in 1954, because on July 13, 1954, before the Board made its decision, the Adjutant General sent a telegram (Pet. App. 49a) to the Commanding General at Brooke Hospital stating that that Board had concurred in the findings of the Review Council. Since petitioner's contention apparently was never made until the time of trial—8½ years after the telegram was sent—it is impossible to reconstruct the events with certainty. However, the logical inference from the record is not that there was "prejudgment" of the case, but either that the telegram is misdated, or that the Board decided the case on July 13, 1954, and notified the Adjutant General informally that day but did not submit its formal written notification of the decision to the Adjutant General until two days later.

Petitioner's contention (Pet. 11-13), that the Physical Review Council failed to make specific findings and failed to advise him "on the point of dis-

agreement" between the Physical Evaluation Board and the Physical Review Council is groundless. As the Court of Claims pointed out (Pet. App. 7a-8a) petitioner's lengthy statements in opposition to the 1953 and 1954 determinations of the Review Council show that he adequately understood the issue. There was essentially no dispute concerning the nature of petitioner's ailments, and the "point of disagreement" was—as indicated by the Review Council—whether the clinical findings supported the view that the ailments were "of a degree which would preclude the performance of military duty" (See Pet. App. 2a-5a).[5]

Finally, there is no merit to the contentions (Pet. 14-15) that the court below applied erroneous standards in determining whether petitioner was fit for duty, and that the determination was not supported by the evidence. Far from suggesting that petitioner's ability to perform desk work in an outstanding manner was conclusive, the Court of Claims expressly stated that (Pet. App. 6a), while that fact lent some support to the determination of non-disability, it would not be given undue emphasis in considering fitness for general duty.

There is substantial evidence in the record to justify the finding that petitioner was fit for duty.

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[5] Nor is there any support in the applicable regulation (AR 15-160, Pet. App. 41a-46a) for the view that the Physical Review Council must make detailed factual findings. On the contrary, the regulation seems to contemplate broad general findings, such as that the disability is or is not "permanent" (see Par. 2(a), Pet. App. 42a).

For example, x-rays taken on at least two separate occasions revealed that petitioner had only "minimal" arthritis (Pet. App. 21a-23a), and thorough physical examination resulted in a diagnosis of "minimal" lower back strain. The Board of Medical Officers at Walter Reed specifically found petitioner fit for "general" military duty commensurate with his age, rank and experience, including overseas duty, and that his degree of disability for military service was "None". It recommended his return to "full military duty" (Pet. App. 22a-23a).[6]

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[6] Petitioner's assertion (Pet. 15) that he was found unfit in every case in which he was personally examined by a medical officer, is incorrect. See, generally, the evidence summarized in the findings of the court below (Pet. App. 20a-26a). Defendant's Exhibits 84-98 show that the petitioner's physical examinations in 1956 were thorough, and that the action of the Medical Board was based on and supported by, numerous consultation reports.

The Court of Claims also properly rejected petitioner's factual allegations (Pet. 14) that the Medical Board at Walter Reed treated him unfairly (Pet. App. 8a-9a).

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.

AUGUST, 1967.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 354

JOSEPH J. IMHOFF, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY TO MEMORANDUM FOR THE UNITED STATES

While the memorandum filed by the Honorable Solicitor General in opposition to the petition for Writ of Certiorari fails to rebut the principal reasons advanced by petitioner for granting the writ, it does raise several points about which clarification is in order. We reply to these briefly, as follows:

1. In referring to the monetary relief sought by petitioner before the Court of Claims (Opp. Mem., footnote 1), the government makes reference only to the income tax credit claimed for disability retirement benefits. The petition filed below also prays judgment

"for the difference in pay between that of a Lieutenant Colonel and a Colonel for the period 1 September 1953 through 30 November 1956".

2. The Solicitor General (Opp. Mem. p. 2) says the Inspector General "rejected" petitioner's contention "that he had not been sufficiently advised of the reasons for the action of the Physical Evaluation Record".[1] But this is not petitioner's contention at all. As explained at page 5 of our petition, it was the initial procedural defect by the Physical Review Council in August 1953 which was questioned. On this point, the president of the Physical Evaluation Board, Fourth Army, Colonel Edgar M. King, stated to the Fourth Army Inspector General that the Physical Evaluation Board itself did not know of the basis for the decision of Physical Review Council in disapproving his Board's findings.[2] It was this failure of the Council to furnish "the point of disagreement" which petitioner questioned and protested. The Inspector General did not reject petitioner's contention, but merely transmitted the reply from the Council to Fourth Army.

3. The Solicitor General points to a 1956 Efficiency Report (Opp. Mem. p. 3) to support an argument of non-disability. This standard form report prepared by a non-medical officer, covered a period of service when petitioner was assigned to limited duty in Washington, D. C. at which time he was undergoing medical treatment. On this assignment petitioner was able to be on

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[1] The Solicitor General probably means Physical Evaluation Board.

[2] See: Pls. Ex. 4, p. 13, of the record.

duty only about fifty percent of the time. This report had no relevance whatsoever to a disability determination, which could only be ascertained by a final-type physical examination.

4. The government's claim that allegations of procedural error are not germane nor substantial does not withstand either legal or factual scrutiny. Noncompliance with applicable laws and regulations invalidates the resulting action in any disability review process and so the Court of Claims has held. *Frederick* v. *United States,* 150 C.Cls. 769 (1960). The administrative decision must have been "conscientiously made." *Golding* v. *United States,* 131 C.Cls. 677, 680; 130 F. Supp. 628, 630 (1955). The incidents of noncompliance are plainly set forth in Sections I and II of our petition. The invalidity of these 1953 and 1954 proceedings would guarantee petitioner a disability retirement determination retroactive to the date his retirement would have been effected, had such errors not occurred—in this case, September 1, 1953.

From 1953 on, petitioner's retention in a duty status cannot be classed as "voluntarily" remaining in active service, as the Solicitor General alleges, in the face of (a) petitioner's 1953 tender of resignation (Pet. App. 14a), and (b) the several physical reports showing petitioner to be disabled. Since Army regulations do not permit a disabled officer to resign, petitioner was caught in the hopeless position of being unable to resign because of a disability finding and not being retired for disability by reason of the erroneous retirement process accorded him. His continuation in a duty status until 1956 was occasioned by this dilemna and was anything but voluntary. It was just the opposite.

5. The government argues that unless the 1956 Medical Board determination is found to be in error, petitioner cannot recover. As we have shown above, if the 1953 and 1954 proceedings were invalid, retirement entitlement commences at that time, and the 1956 proceeding requires no consideration whatsoever. But, as we have shown in our petition, the 1956 Walter Reed proceeding, particularly the Medical Board, instead of being "extensive" (Opp. Mem. p. 3) or "thorough" (Opp. Mem. p. 4) as the government contends, was replete with glaring irregularities (Pet. p. 14-15), unsupported by substantial evidence, and carried out in bad faith. There was no medical examination by the Walter Reed Board in 1956, virtually no consideration of petitioner's case by the Board. Its president announced the Board had previously arrived at its decision, and the Board's report of proceedings was prepared in advance—clearly a denial of the "full and fair hearing" guarantee of 10 U.S.C. 1214.

6. The suggestion that petitioner waited 8½ years, and thus inordinately delayed making known his objection to the prejudgment of his case on July 13, 1954, just simply is not a fair statement. The record clearly reveals that this irregular activity of the Army Physical Disability Review Board[3] was concealed from petitioner until the time of trial some 8½ years later. In fact, the petitioner upon learning of the prejudgment was most prompt in making his objections known to the court below. That the telegraph message of the Adjutant General to the Commanding General of Brooke Army Hospital constituted a prejudgment of

[3] The Solicitor General probably means Physical Disability Appeal Board (Opp. Mem. p. 5).

petitioner's case, as stated in Section I of our petition, is beyond question.

7. The government contends that the lengthy statements of August 21 and September 11, 1963 (Pet. App. 13a and 14b). show that petitioner "adequately understood the issue" raised by the Physical Review Council (Opp. Mem. p. 6). If this were so, the Fourth Army Commanding General would never have instructed his Inspector General to intercede, and the president of the Physical Evaluation Board would never have advised the Fourth Army Inspector General that the Physical Evaluation Board itself could not ascertain "the point of disagreement." Petitioner repeatedly sought to ascertain the medical basis of the Council's conclusion as to the "point of disagreement" between the Council and Physical Evaluation Board. The Department of Defense Directive, DA Pamphlet 21-48, (Pet. App. 37a) accords petitioner either the "right" to respond "on the point of disagreement," or to have the determination of the Physical Evaluation Board stand. But, if neither he nor others concerned had any idea as to what this point was, it was impossible to so respond. This is the procedural error.

8. In reply to the argument of lack of merit in point III of our petition, we submit that there is no doubt whatever that the court below "applied erroneous standards in determining whether petitioner was fit for duty", because the record clearly shows that for several years prior to retirement petitioner was qualified solely for, and did perform, only very limited desk duty as prescribed by and under the surveillance of Army physicians. To construe such physical capability as meeting the test for "performance of full military duty, field as well as garrison in both peace

and war" (*Weiner* v. *United States,* 148 C.Cls. 445 (1960)) demonstrates a complete lack of understanding as to what constitutes military duty.

9. Finally, the Solicitor General says the record establishes petitioner's fitness for duty and then goes on to rely on the actions of the Walter Reed Medical Board to support his position. This Board, which met November 21, 1956, was the eleventh such board before which petitioner appeared between 1953 and 1956. Its actions constitute a complete disregard of the long established statutory hearing guarantees and which have been summarized in our petition for a writ of certiorari. Even the Walter Reed Board Member-Recorder was unable at the trial in the court below to rehabilitate the proceeding irregularities of this Board (Tr. 241). The record shows that in every other instance in which petitioner appeared before a board of officers, i.e., 10 boards, he was found to be physically unfit for military duty—without the dissenting vote of a single board member.

CONCLUSION

For the reasons as set forth in our petition and in this reply, the petition for writ of certiorari should be granted.

Respectfully submitted,

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